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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HONDA MOTOR COMPANY, LTD. and
AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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June 7, 1982

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QUESTIONS PRESENTED

1. Where, while the appeal was pending, the Supreme Court of Florida issued an opinion requiring proof of some fault on the part of a principal for vicarious liability for punitive damages, and the opinion of the Court of Appeals said there was no evidence of fault on the part of the principal in this case, did the decision of the Court of Appeals reinstating the judgment for punitive damages violate 28 U.S.C. § 1652, the Rules of Decision statute?

2. Where state law requires proof by a plaintiff of some fault on the part of a principal before the principal may be vicariously liable for punitive damages, does imposition of punitive damages when the evidence does not distinguish between the acts of principal and agent violate due process requirements by shifting the burden of proof to the defendant?

3. May punitive damages be awarded against an automobile manufacturer which has complied with all applicable federal regulations, when those regulations preempt state law and where state law requires proof of wanton disregard of the rights of others for imposition of punitive damages?

Petitioners also desire to reserve the right to argue the question of the sufficiency of the evidence to support the award of compensatory damages should this Court accept jurisdiction, but recognize that question is not appropriate as a basis for certiorari.

LIST OF SUBSIDIARY AND AFFILIATED COMPANIES

American Honda Motor Company, Inc., is a wholly owned subsidiary of Honda Motor Company, Ltd., which is the parent corporation. The following is a list of subsidiary and affiliate corporations of Honda Motor Co., Ltd., which are not wholly owned:

JAPANESE COMPANIES

Honda S.R. Corporation
Honda Carburetor Research and Development Co., Ltd.
Honda Land Co., Ltd.
Kaihatsu Sogyo K.K.
ACT Maritime Co., Ltd.
Press Engineering Co., Ltd.
Asama Giken Co., Ltd.
KGD Co., Ltd.
Showa Manufacturing Co., Ltd.
K. K. Honda Express
Keihin Seiki Mfg. Co., Ltd.
Honda Kinzoku Gijutsu K.K.
Tokyo Seat K.K.
Goshi Giken Kogyo K.K.
Yachiyou Kogyo K.K.
K.K. Steel Center
Hirata Press Kogyo K.K.
Takao Kinzoku Kogyo K.K.
Kyushu Uanagawa Seiki Co., Ltd.
Kyushu Musashi Seimitsu K.K.
K.K. Atsumi Seisakusho
K.K. Tanaka Machine Kogyo
K.K. Torii Togo Kojo
Nissin Kogyo K.K.
Fuji Chemical Co., Ltd.
Kokusan Kogyo K.K.
Daishin Sangyo K.K.

Keihin Carburetor Co., Ltd.
Towa Kogyo K.K.
Fukuda Press Kogyo K.K.
K.K. Matsuyama Seisakusho
Mitswa Kokan K.K.
Moriskawa Sangyou K.K.
Yanagwa Seiki K.K.
K.K. Riken

FOREIGN COMPANIES

Thai Honda Mfg. Co., Ltd.
Honda Europe N.V.
Honda Motor Gmb H
United Car Transport Co.
Honda (Suisse) S.A.
Honda Automobile (Suissee) S.A.
Armstrong Cycle Parts BND. BHD.
Mariwasa Honda Inc.
P.T. Imora Honda Inc.
Honda Del Peru S.A.
Tizro Mfg. Co.
Honda Manufacturing (Nigeria) Ltd.
Honda Espana S.A.
Armstrong Auto Parts SDN. BHD.
Asian Auto Parts Co., Ltd.

UNITED STATES COMPANIES

Belmer Co.
Honda of America Mfg. Inc.

INDEX

	Page
QUESTIONS PRESENTED	i
LIST OF SUBSIDIARY AND AFFILIATED COMPANIES OF HONDA MOTOR CO., LTD.	ii
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
1. The Decision Below Conflicts With The Decisions Of This Court As To The Duty Of Federal Appellate Courts To Apply Controlling State Law	6
2. The Decision Below Raises A Significant Due Process Question By Shifting The Burden Of Proof On An Essential Element Of The Claim From The Plaintiffs To The Defendants	8
3. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision	10
4. The Decision Below Raises A Significant Question Concerning The Propriety Of Imposition Of Punitive Damages On A Manufacturer Which Complies With The National Traffic And Motor Vehicle Safety Act Of 1966, 15 U.S.C. §§ 1381 *et seq.*	11
CONCLUSION	13

APPENDIX:

OPINION AND JUDGMENT OF COURT OF APPEALS 1a

ORDER MODIFYING OPINION AND DENYING REHEARING 18a

ORDER DENYING REHEARING EN BANC 21a

MEMORANDUM OF DECISION OF DISTRICT COURT GRANTING DEFENDANTS' MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO ON CLAIM FOR PUNITIVE DAMAGES 23a

OPINION OF THE SUPREME COURT OF THE STATE OF FLORIDA IN *MERCURY MOTOR EXPRESS, INC.* v. *SMITH*, 393 So.2d 545 (1981) 31a

CONSTITUTIONAL AND STATUTORY PROVISIONS 38a

CITATIONS

CASES: Page

Hendeles v. *Sanford Auto Auction, Inc.*, 364 So.2d 467 (Fla. 1978) 8

Huddleston v. *Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944) 6, 8

In Re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970) 9

Mercury Motors Express, Inc. v. *Smith*, 393 So.2d 545 (Fla. 1981) 6, 7, 8, 9, 11

Seese v. *Volkswagenwerk, A.G.*, 648 F.2d 833 (3d Cir. 1981), *cert. den.*, ____ U.S. ____ , 102 S.Ct. 330 (1981) ... 13

Texas Dept. of Community Aff. v. *Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) 10

United States v. *Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1802) 6

Vandenbark v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941) 6, 8

CONSTITUTION & STATUTES:

U.S. Const., amend. V 9

15 U.S.C. § 1381 12

15 U.S.C. § 1391(1) 11

15 U.S.C. § 1391(2) 11

15 U.S.C. § 1392(d) 11, 12, 13

Citations Continued

	Page
15 U.S.C. § 1392(f)	11
15 U.S.C. § 1397(c)	12
28 U.S.C. § 1652	6, 8

MISCELLANEOUS:

Senate Report No. 1301, 1966 *U.S. Code Congr. & Admin. News*, p. 2709	12

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v.

GLEN K. DORSEY, BARBARA DORSEY,
CONTINENTAL CASUALTY CO., and
MISSION INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, HONDA MOTOR COMPANY, LTD. and AMERICAN HONDA MOTOR CO., INC., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 11, 1981, rehearing denied and opinion modified, March 8, 1982, and rehearing en banc denied, April 30, 1982.

OPINION BELOW

The opinion of the Court of Appeals, reported at 655 F.2d 650; the order modifying the opinion and denying rehearing, reported at 670 F.2d 21, and the order denying rehearing en banc, reported at 673 F.2d 911, appear in the Appendix. The Memorandum of Decision of the District Court of the Middle

District of Florida, Orlando Division, setting aside the jury verdict for punitive damages also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 11, 1981. A timely petition for rehearing was denied March 8, 1982. A petition for rehearing en banc was subsequently filed and Respondents Dorseys moved to strike the petition as untimely. The motion to strike was denied and rehearing en banc was denied on April 30, 1982. This petition for certiorari was filed within 90 days of March 8, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional and statutory provisions involved in this petition are set out in full in the Appendix. Their citations follow:

U.S. Const., amend. V
15 U.S.C. § 1381
15 U.S.C. § 1391(1)
15 U.S.C. § 1391(2)
15 U.S.C. § 1392(d)
15 U.S.C. § 1392(f)
15 U.S.C. § 1397(c)
28 U.S.C. § 1652

STATEMENT OF THE CASE

This is a diversity case involving the crashworthiness of the Honda AN 600. The district court had jurisdiction pursuant to 28 U.S.C. § 1332, because the Dorseys are citizens of Florida and each of the defendants is a citizen of a state other than Florida, or a citizen of a foreign state and the amount in controversy exceeded $10,000. Mission Insurance Company and Continental Casualty Co., the insurers of Honda Motor

Co., Ltd. (Honda), were defendants in the trial court and are named as respondents here because they may continue to have an interest in the outcome, but did not wish to join as petitioners.

Mr. Dorsey received serious head injuries, though wearing his seat belt, when his Honda AN 600 weighing 1,300 pounds was involved in a collision in Florida with a full sized Ford weighing 3,600 pounds. The Ford was attempting a left hand turn, and the impact was at a 45° angle. The Dorseys sued Honda, the manufacturer, and American Honda, the distributor, alleging a design defect, and seeking recovery on negligence, warranty, and strict liability theories. The AN 600 was designed and tested by Honda Research and Development (Honda R & D), a wholly owned corporate subsidiary of Honda, but not a party to the lawsuit.

Florida law was controlling, and on November 28, 1978, all parties entered into a pretrial stipulation. Among other things that stipulation included the following stipulation on the vicarious liability of Honda:

> VII. Principles Of Law On Which There Is Agreement: 1. Honda Motor Company, Ltd., As The Manufacturer Is Liable For Any Negligence Of [sic - "or"] Breach Of Warranty With Respect To Any Component Part Which Is Defectively Designed And Manufactured Even Though Such Part May Have Been Obtained From A Third-Party Supplier.

Four months later, March 28, 1979, the Dorsey's made their first claim for punitive damages in the Amendment to Third Amended Complaint.

The case was tried to a jury which returned a special verdict finding Honda and American Honda liable on all theories and awarding compensatory damages of $825,000. The jury also awarded punitive damages of $5,000,000 against Honda alone.

Under one view of the evidence, head-on barrier tests on prototypes conducted by Honda R & D resulted in head injuries to the test dummy. The evidence was uncontradicted, however, that production models of the AN 600 complied with all applicable federal standards, including steering wheel displacement, strength of the seat assembly, and strength, elasticity, and anchorage of the seat belts.

On hearing post-trial motions, the district court allowed the compensatory damages to stand, but struck the punitive damage award as contrary to the law of Florida. The district court ruled that because it was basically the diminutive size of the Honda and the difference in size between the two cars which made the Honda unsafe, and because the Dorseys' vehicle was manufactured in accordance with all applicable federal standards, the evidence precluded a finding of such an entire want of care necessary for an award of punitive damages under Florida law.

On appeal, a panel of the Fifth Circuit (which contained no Florida judges), upheld the compensatory damages, but reversed the trial court's decision on punitive damages, reinstating the $5,000,000. The Court of Appeals said that the seat assembly and seat belt elasticity (both covered by and complying with federal standards) were causal factors of injury unrelated to the car's size. 655 F.2d at 655. The Court of Appeals also found that there was no evidence of recklessness or even knowledge of a defect on the part of Honda, stating:

> Neither Continental nor the district court points us to substantial evidence that any responsible person of Honda was reckless or even that any such person had knowledge of the results of the tests conducted by Honda R & D or of the recommendations of Honda R & D employees that design of the AN 600 be changed. The liability of Honda is, therefore, not based upon its own acts but upon those of

> Honda R & D and its employees, for which Honda in the pretrial order accepted responsibility. 655 F.2d at 660.

This language clearly states the vicarious basis of the liability of Honda for punitive damages. Honda would have been vicariously liable for punitive damages based solely on the conduct of its employees or agents until the decision in *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981).

In *Mercury Motors*, the Supreme Court of Florida reversed one decision and overruled others which had held that the principal could be vicariously liable for punitive damages, just as for compensatory damages, even if he were without fault. The Florida court replaced this rule with the requirement that a plaintiff allege and prove some fault on the part of the principal which foreseeably contributed to the plaintiff's injury before a principal may be held vicariously liable for punitive damages.

The decision in *Mercury Motors*, issued a few days before oral argument in this case, was brought to the attention of the Court of Appeals before its opinion was issued. It was also the basis for a petition for rehearing. The Fifth Circuit denied rehearing, but issued an opinion in which it noted the decision in *Mercury Motors*, and reiterated that there was no clear evidence of what Honda, as opposed to Honda R & D had done. The court's response, however, was to modify its opinion by deleting its comments that there was no evidence of fault on the part of Honda, independent of Honda R & D.

Thereupon, Honda sought rehearing en banc based upon *Mercury Motors* and the requirement that federal courts of appeals follow controlling state law. That rehearing was denied, and this petition follows.

REASONS FOR GRANTING THE WRIT

1. The Decision Conflicts With The Decisions Of This Court As To The Duty Of Federal Appellate Courts To Apply Controlling State Law.

In *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941) and *Huddleston* v. *Dwyer*, 322 U.S. 232, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944), this Court held that the Rules of Decision statute, 28 U.S.C. § 1652, requires that federal appellate courts apply controlling state law as it exists at the time of appeal, even when the law has changed subsequent to the judgment in the district court. In *Vandenbark*, the Court stated that the rule to be followed was that stated in *United States* v. *Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1802):

> "But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." *Vandenbark*, 311 U.S. at 541.

The Court of Appeals neither obeyed nor denied the obligation of *Mercury Motors Express, Inc.* v. *Smith*, 393 So.2d 545 (Fla. 1981), that there must be evidence of some fault on the part of the principal before the principal may be vicariously liable for punitive damages. Rather, it simply deleted from its opinion the comments that there was no evidence of fault on the part of Honda.

In its opinion denying rehearing, the Court of Appeals ruled that, the case having been tried under the pretrial order (which simply stated the law of Florida as it existed), it was "too late" for Honda to rely on *Mercury Motors*. 670 F.2d at 22. But that ruling is directly contrary to the holdings in *Vandenbark* and *Huddleston* which ruled that the litigants in cases controlled by state law may raise a change in state law at any time as long as the case is *sub judice*. The opinion of the Fifth Circuit announces a rule in direct conflict with the one long established

by this Court that it is the duty of a federal appellate court to apply state law as it exists at the time of appeal, not as it existed at the time of trial.

In this case, the Court of Appeals recognized that its decision conflicted with the law of Florida. That awareness of conflict is evidenced by the court's deleting portions of its opinion without any statement that the deleted portions were contrary to the record or otherwise inaccurate. In its opinion denying rehearing, the Court of Appeals attempted to justify its result by reference to the pretrial stipulation. That stipulation, however, cannot justify the court's refusal to follow state law. In the first place, the stipulation was an agreement on the applicability of the rule of a manufacturer's vicarious liability for negligence or breach of warranty by third parties, which was and remains the law of Florida. It was not a stipulation of fact, and therefore cannot supply evidence of fault missing from the record. Secondly, the stipulation had no application to punitive damages, being limited to negligence and breach warranty, and having been entered into four months before any claim for punitive damages was made.

While this is a diversity case, the issue involved is not whether state law was correctly applied to the facts. The issue is whether the Court of Appeals complied with federal law and the decisions of this Court in deciding the case. In diversity cases, federal courts are bound by state law. Any other rule would lead to confusion and injustice as the result of inconsistent federal and state interpretations of state law. The Rules of Decision statute and decisions of this Court express the federal policy that the outcome of a case governed by state law should be the same whether the case is tried in federal or state court. Otherwise, certainty in the law is lost, and the door is opened for forum shopping by the parties.

If this case had been tried in state court, the punitive damage award would have been reversed on the authority of *Mercury*

Motors for the lack of evidence of fault on the part of Honda because the law of Florida is that an appellate court must apply the law as it exists at the time of appeal. *Hendeles* v. *Sanford Auto Auction, Inc.*, 364 So.2d 467 (Fla. 1978).

In *Vandenbark* and *Huddleston* this Court granted certiorari to review decisions of courts of appeals which had failed to follow controlling decisions of state supreme courts issued while the appeal was pending. This Court should also grant certiorari in this case. The opinion of the Court of Appeals on rehearing recognized the requirements of *Mercury Motors*. In its original opinion it had ruled that the implication that the liability of Honda had arisen out of its own faulty conduct in "adopting" the design was "not supported by the evidence." 655 F.2d at 660. The Fifth Circuit's action in reinstating punitive damages where there was no evidence of fault on the part of Honda and contrary to the law of Florida, and ruling that it was "too late" for Honda to rely on *Mercury Motors*, is diametrically opposed to the decisions of this Court in *Vandenbark* and *Huddleston*, and is contrary to 28 U.S.C. § 1652. The opinions in this case stand as controlling, but contradictory, precedent with *Mercury Motors* for the district courts of Florida. Florida is a large and growing commercial state. Litigation over products liability, and the availability of punitive damages in such cases, is a significant and increasingly important area of state law. Federal courts should not be allowed to ignore the decisions of the state supreme court on these points, and thereby frustrate the policies of the state with respect to liability for punitive damages.

2. The Decision Of The Court Of Appeals Raises A Significant Due Process Question By Shifting The Burden Of Proof On An Essential Element Of The Claim.

The allocation of the burden of proof on the plaintiff to establish every element of his claim essential to recovery is a fundamental part of the civil trial system in this country, and as

such is part of the due process guarantee of the Constitution. This Court has held unequivocally that the prosecution's burden of proving every fact necessary to constitute the crime charged is required by the Due Process Clause. *In Re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). Because the Due Process Clause applies to the deprivation of property, as well as liberty, it is unconstitutional for a court to deprive a defendant of his property by a judgment when the plaintiff has not proved every fact necessary to recover on the claim.

In this case, the Court of Appeals has shifted the burden of proof from the plaintiff to the defendant because by reinstating punitive damages where the evidence did not distinguish any faulty conduct by Honda it has placed the consequences of the lack of evidence on the defendant. This violates due process requirements where proof of some fault on the part of Honda was an essential element of the claim for punitive damages.

This is not a case where the issue is whether the evidence was sufficient to prove an essential element of the claim, for the Fifth Circuit ruled that there was no evidence of fault by Honda. In its original opinion, the Court of Appeals said that the claim that there was faulty conduct on the part of Honda was "not supported by the evidence." 655 F.2d at 660.

The Fifth Circuit decision is a precedent for all future punitive damages claims brought in the district courts of Florida. It allows plaintiffs to recover punitive damages in vicarious liability cases unless the defendant proves that it is without fault, for according to this decision, if the evidence does not distinguish between the principal and agent, the plaintiff may recover punitive damages. This result violates the fundamental, traditional process of civil trials; requires defendants to prove a negative proposition, and is directly contrary to the law of Florida which requires the plaintiff to prove fault on the part of the principal before the principal may be vicariously liable for punitive damages. *Mercury Motors*, 393 So.2d at 549.

It was a decision of the Fifth Circuit shifting the burden of proof which this Court granted certiorari to review, and reversed, in *Texas Dept. of Community Aff.* v. *Burdine*, 450 U.S. 240, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

This Court should grant certiorari in this case because the decision removes from all future plaintiffs in the district courts of Florida the burden of proving some fault on the part of a principal in order to recover punitive damages. Removing a plaintiff's burden of proving an essential element of a claim is a denial of due process, and establishes a system in Florida in which a plaintiff may avoid the substantive requirements of Florida law by filing in federal court.

3. The Court Of Appeals Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The foundation of appellate proceedings in this country is the reasoned application of principles of law to the facts established in the record. In this case, the Court of Appeals ignored the record and the law of Florida to reach a particular result through the exercise of raw judicial power by deleting the portion of the opinion which showed that the evidence was contrary to the result reached.

In its original opinion the Fifth Circuit ruled that there was no evidence of faulty conduct on the part of Honda. 655 F.2d at 660. The opinion denying rehearing sets out the requirement of Florida law that there must be some fault on the part of the principal before the principal may be held vicariously liable for punitive damages. 670 F.2d at 22. The second opinion also noted Honda's position that the original opinion excluded the possibility of fault on its part. 670 F.2d at 22. With no attempt to reconcile the conflict between its decision and controlling state law, the Court of Appeals took the extraordinary step of "deleting" all the language finding no evidence of fault on the part of Honda from its decision.

Changing the language of the opinion, however, does not change either the lack of evidence or the law. It is only a transparent effort to avoid having to apply *Mercury Motors* and reverse the award of punitive damages. The displeasure of the Fifth Circuit with the potential effect of *Mercury Motors* on this case is best illustrated by its pejorative reference to that decision as an "escape hatch." 670 F.2d at 22.

Even though Florida law requires proof of fault on the part of a principal, and in spite of its own recognition that there is no evidence of fault on the part of Honda, the Court of Appeals reinstated the punitive damage award against Honda. This result cannot be justified on the basis of the pretrial stipulation since that stipulation was not a stipulation of fact and therefore could not supply unproved facts, and since it had nothing to do with punitive damages which were not even claimed until four months after the stipulation.

The actions of the Court of Appeals are without justification and cannot but undermine confidence in the judicial system. This Court should grant certiorari and review the decision in this case.

4. The Decision Below Raises A Significant Question Concerning The Imposition Of Punitive Damages On A Manufacturer Which Complies With The National Traffic And Motor Vehicle Safety Act Of 1966, 15 U.S.C. § 1381 et seq.

This is apparently the first case in which a federal court has allowed punitive damages where the vehicle complied with all applicable federal standards. The "crashworthiness" of automobiles and claims for punitive damages for design defects is a growing area of litigation. Congress has undertaken preemptive regulation of automobile safety standards pursuant to 15 U.S.C. § 1392(d). Standards established pursuant to the statute are to be reasonable. 15 U.S.C. § 1392(f)(3), and are minimum standards for performance which protect against unreasonable risk of injury. 15 U.S.C. §§ 1391(1) and (2). The purpose of

the statute and regulations is to reduce death and injuries resulting from traffic accidents, and to provide a uniform system of national safety standards. 15 U.S.C. §§ 1381 and 1392(d); Senate Report No. 1301, 1966 *U.S. Code Congr. & Admin. News*, p. 2709 at 2712.

In this case the Court of Appeals pointed to the design of the seat belts and seat assembly as causal factors of Mr. Dorsey's injuries unrelated to the size of the automobile. Both of these were governed by federal standards and the Honda AN 600 complied with these regulations. There was no issue at trial over the reasonableness of the standards, and the Plaintiff's own expert testified that meeting federal standards is generally recognized as reasonable compliance in design [T.T. Vol. III, p. 113].

The federal statute does provide that compliance with federal standards does not exempt any person from any common law liability. 15 U.S.C. § 1397(c). Senate Report No. 1301 stated, "[T]he federal minimum safety standards need not be interpreted as restricting state common law standards of care." 1966 *U.S. Code Congr. & Admin. News*, p. 2720. However, the federal statute also prohibits any state from establishing any safety standard not identical with the federal standard, except for cars purchased by the state. 15 U.S.C. § 1392(d). This precludes even more stringent standards.

It is incongruous that compliance with federal standards which by statute are required to be reasonable minimum standards of performance which protect against unreasonable risk of injury to persons involved in accidents, and which are preemptive, can result in a finding not only of a lack of reasonable care by the manufacturer, but also of a lack of any care, a necessary finding for the imposition of punitive damages. The ultimate effect of jury verdicts arrived at under different state laws and reaching beyond the federal standards is the imposition of conflicting standards on manufacturers, especially where the

causal factors of injury are covered by federal standards with which the manufacturer complied, as in this case. *See, Seese* v. *Volkswagenwerk, A.G.*, 648 F.2d 833, 855 (3d Cir. 1981) (Adams, J., dissenting), *cert. den.* ____ U.S. ____ , 102 S.Ct. 330 (1981). This result is contrary to the preemptive provisions of 15 U.S.C. § 1392(d), and frustrates the congressional purpose of uniform national regulation.

Because the issue of the effect of compliance with this federal statute will undoubtedly be raised more frequently in both state and federal courts as crashworthiness litigation increases, the Court should grant certiorari in this case to clarify the fedeal law and to provide for certainty and uniformity in the cases certain to follow.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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